

the Corps goal is to have the Corps regulatory program operate as consistently as possible, particularly with respect to interpretations of law, regulation, an Executive Order, and officially-promulgated policy. Therefore, a copy of each appeal decision will be forwarded to Corps Headquarters; those decisions will be periodically reviewed at the headquarters level for consistency with law, Executive Orders and policy. Additional official guidance will be issued as necessary to maintain or improve the consistency of the Corps' appellate and permit decisions.

**§ 331.8 Timeframes for final appeal decisions.**

The Corps will make a final decision on the merits of the appeal at the earliest practicable time, in accordance with the time limits set forth below. The administrative appeal process is initiated by the receipt of an RFA by the division engineer. The Corps will review the RFA to determine whether the action is appealable. If the division engineer determines that the action is not appealable, the division engineer will notify the appellant accordingly within 30 days of the receipt of the RFA. If the division engineer determines that the action is appealable and the RFA is complete, the RO will request the administrative record from the district engineer. The division engineer will make a final decision on the merits of the appeal within 90 days of the receipt of the complete RFA.

**§ 331.9 Final appeal decision.**

(a) In accordance with the authorities contained in § 331.3(b), the division engineer will make a decision on the merits of the appeal. While reviewing an appeal and reaching a decision on the merits of an appeal, the division engineer can consult with or seek information from any person, including the district engineer.

(b) The division engineer will disapprove the entirety of or any part of the district engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regu-

lation, an Executive Order, or officially-promulgated Corps policy guidance. The division engineer will not attempt to substitute his judgment for that of the district engineer regarding a matter of fact, so long as the district engineer's determination was supported by substantial evidence in the administrative record, or regarding any other matter if the district engineer's determination was reasonable and within the zone of discretion delegated to the district engineer by Corps regulations. The division engineer may instruct the district engineer on how to correct any procedural error that was prejudicial to the appellant (i.e., that was not a "harmless" procedural error), or to reconsider the decision where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, in the administrative record. The division engineer will document his decision on the merits of the appeal in writing, and provide a copy of this decision to the applicant (using certified mail) and the district engineer.

(c) The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

**§ 331.10 Final Corps decision.**

The final Corps decision on a permit application is the initial decision to issue or deny a permit, unless the permittee submits an RFA, and the division engineer accepts the RFA, pursuant to this Part. The final Corps decision on an appealed action is as follows:

(a) If the division engineer determines that the appeal is without merit, the final Corps decision is the district engineer's letter advising the applicant that the division engineer has decided that the appeal is without merit, and confirming the district engineer's initial permit decision; or

(b) If the division engineer determines that the appeal has merit, the final Corps decision is the district engineer's decision made pursuant to the division engineer's remand of the appealed action. The division engineer

will remand the decision to the district engineer with specific instructions to review the administrative record, and to further analyze or evaluate specific issues. If the district engineer determines that the effects of the district engineer's reconsideration of the administrative record would be narrow in scope and impact, the district engineer must provide notification only to those parties who commented or participated in the original review, and would allow 15 days for the submission of supplemental comments. Where the district engineer determines that the effect of the district engineer's reconsideration of the administrative record would be substantial in scope and impact, the district engineer's review process will include issuance of a new public notice, and/or preparation of a supplemental environmental analysis and decision document (see 33 CFR 325.7). Subsequently, the district engineer's decision made pursuant to the division engineer's remand of the appealed action becomes the final Corps action. Nothing in this rule precludes the agencies' authorities pursuant to Section 404(q) of the Clean Water Act.

#### **§331.11 Unauthorized activities.**

Permit denials and declined individual permits associated with after-the-fact permit applications are appealable actions for the purposes of these regulations. If the Corps accepts an after-the-fact permit application, an administrative appeal of a permit denial or declined individual permit may be filed and processed in accordance with these regulations subject to the provisions of paragraphs (a), (b), and (c) of this section.

(a) *Initial Corrective Measures.* If the district engineer determines that initial corrective measures are necessary pursuant to 33 CFR 326.3(d), an RFA for an appealable action will not be accepted by the Corps, until the initial

corrective measures have been completed to the satisfaction of the district engineer.

(b) *Penalties.* If an affected party requests, under this Section, an administrative appeal of an appealable action prior to the resolution of the unauthorized activity, and the division engineer determines that the appeal has no merit, the responsible party remains subject to any civil, criminal, and administrative penalties as provided by law.

(c) *Tolling of Statute of Limitations.* Any person who applies for an after-the-fact permit, where the application is accepted and processed by the Corps, thereby agrees that the statute of limitations regarding any violation associated with that application is tolled until one year after the final Corps decision, as defined at 33 CFR 331.10. Moreover, the applicant for an after-the-fact permit must also memorialize that agreement to toll the statute of limitations, by signing an agreement to that effect, in exchange for the Corps acceptance of the after-the-fact permit application, and/or any administrative appeal (See 33 CFR 326.3(e)(1)(v).) No after-the-fact permit application or administrative appeal will be accepted until such written tolling agreement is furnished to the district engineer.

#### **§331.12 Exhaustion of administrative remedies.**

No affected party may file a legal action in the Federal courts based on a permit denial or declined individual permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this Part. The appellant is considered to have exhausted all administrative remedies when a final Corps decision is made in accordance with §331.10 of this Part.